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No. 90——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech and press clauses limit the power of a state to punish a lawyer who holds a press conference decrying criminal charges against his client as based upon police and prosecutorial misconduct, when there is no record evidence that the conference could or did interfere with the impartial administration of justice.

2. Whether, and if so under what circumstances, speech about public officials' behavior on an issue of public concern may be forbidden because the lawyer is counsel in pending litigation involving those officials and issues.

3. Whether a state Supreme Court Rule forbidding lawyer extrajudicial statements having a "substantial likelihood of materially prejudicing an adjudicative proceeding," and decreeing that publicly expressing "any opinion as to the guilt or innocence of a defendant" or the "credibility of a . . . witness" is "ordinarily . . . likely" to have such an effect is impermissibly vague and overbroad under the First Amendment and the due process clause?

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OPINIONS BELOW

The opinion of the Nevada Supreme Court, addressing and rejecting Gentile's federal constitutional challenges, is reported as *Gentile v. State Bar of Nevada*, 789 P.2d 386 (1990).

JURISDICTION OF THIS COURT

The judgment below was entered and filed on February 21, 1990. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1257, because petitioner raised and preserved, and the highest court of the state specifically rejected, a constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right to the people peaceably to

assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

In pertinent part, the Nevada Supreme Court Rule 177 states:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:

a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

. . .

c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;

e. information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;

. . .

3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

a. the general nature of the claim or defense;

b. the information contained in a public record;

c. that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved;

. . .

g. in a criminal case:

. . .

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

STATEMENT OF FACTS

Dominic Gentile is a Nevada attorney with a national reputation as advocate, lecturer, author and leader in bar groups. The Nevada Supreme Court affirmed a private reprimand of Gentile "based on comments he made at a press conference regarding a pending criminal matter at which he represented the accused." (Appendix, at 2a) [hereinafter cited as App.]. Mr. Gentile's client, Grady Sanders, was arraigned on February 5, 1988, on charges of larceny, racketeering and narcotics trafficking. In substance, Grady Sanders was charged with stealing money and drugs from a safety deposit box used by Las Vegas police to store such material. The charges followed a highly-publicized, year-long investigation, during which Sanders' alleged involvement was the subject of dozens of newspaper articles and radio and television news stories. The Las Vegas Metro Police Department was the source of many of these stories.

Mr. Gentile held the press conference on arraignment day, February 5, 1988. He decried the police and press coverage, said that Mr. Sanders was innocent, and suggested that a police officer was in fact the guilty party. Mr. Gentile was aware that the scheduled trial date was over five months in the future. During the conference he indicated that he examined applicable ethics rules in preparation for it and refused to answer a question regarding the credibility of witnesses on ethical grounds. App. 11a.

Sanders' trial did not begin until August 11, 1988. Sanders was acquitted of all charges. The State Bar filed its formal complaint against Mr. Gentile on December 6, 1988, charging a violation of Nevada Supreme Court Rule 177. So far as this record reveals, the police officers and other public officials who fueled the press barrage of 1987 were not disciplined. The prosecutor in the Sanders case was present at a pre-indictment press conference given by the police commander wherein he asserted that his Metro officers had passed a polygraph about the theft and

that the employees of the storage facility had declined such tests. Mr. Sanders was the manager of the storage facility.

Public concern with the Sanders case was high because a large amount of narcotics and travellers' cheques had disappeared from the storage facility used by Las Vegas police as part of a "sting" operation. The media and the public were interested to know whether police officers were involved in the thefts, or whether Mr. Sanders or others were responsible.

At the press conference, Mr. Gentile generally set out his theory of the case and the evidence he expected to develop at trial. App. 6a-16a. His statements would all have been fair argument to a jury. Moreover, extensive *voir dire* concerning pre-trial publicity was conducted of prospective jurors and an impartial jury was empaneled.

Mr. Gentile responded to the Bar complaint, denying that he had violated Rule 177, and raising in briefs and argument the very constitutional issues presented here. Bar counsel's proof consisted entirely of four exhibits: the complaint, a videotape of Mr. Gentile's press conference, and two letters authored by Mr. Gentile. The Southern Nevada Disciplinary Board recommended that Mr. Gentile be given a private reprimand. In affirming, the Nevada Supreme Court made no specific reference to statements at the press conference but concluded generally that:

> The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the . . . potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceeding.

App. 4a.

Although the Nevada Supreme Court found no actual prejudice to the fairness of the trial as a result of Mr.

Gentile's remarks, it affirmed the Board's finding of a violation, and expressly rejected the constitutional challenges presented here. (App. 4a).

ARGUMENT

I. REGULATION OF LAWYER SPEECH ABOUT PENDING LITIGATION RAISES FUNDAMENTAL AND UNRESOLVED ISSUES UNDER THE FIRST AMENDMENT.

This case involves speech about a public official's alleged criminality, a matter of public concern, at a time of intense media interest. It squarely presents the fundamental and recurring issue of how courts are to resolve potential conflicts between "free speech and fair trials [,] two of the most cherished policies of our civilization." *Bridges v. California*, 314 U.S. 252, 260 (1941).

This Court has previously liberated the media, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), public officials, *e.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962), and interested onlookers, *Bridges v. California*, 314 U.S. 252 (1941), from punishment for speaking out on pending cases, absent proof of clear and present danger to the administration of justice. *Compare Cox v. Louisiana*, 379 U.S. 559 (1965) (constitutional guidelines for picketing near a courthouse). Recently, this Court held that a grand jury witness may not be restrained indefinitely from truthful reports of his own testimony. *Butterworth v. Smith*, 110 S. Ct. 1376 (1990).

This Court has never directly addressed whether the First Amendment places limits on the regulation or punishment of attorneys for speech related to pending cases.[1]

[1] In *Re Sawyer*, 360 U.S. 622 (1959), this Court reversed a disciplinary action taken against a defense attorney for speech related to a pending trial, but the Court declined to "reach or intimate any conclusion on the constitutional issues presented." *Id.* at 627. Likewise, in *Re Snyder*, 472 U.S. 634 (1985), this Court confronted a First Amendment claim by counsel concerning speech directed at a federal court, but declined to reach the constitutional issue. *Id.* at 643.

The Court has nonetheless constitutionalized the law of lawyer advertising, overturning various state bar and supreme court ethical restrictions. *E.g.*, *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Re R.M.J.*, 455 U.S. 191 (1982); *Re Primus*, 436 U.S. 412 (1978).

This Court has never, however, spoken about the increasingly vexing problem of lawyer speech about matters of public concern in which the speaker is counsel of record. The problem is pandemic: One need only pick up the newspaper or turn on the radio or television to see it. Moreover, heightened public interest in our system of criminal justice has fostered evolving accommodations between legitimate fair trial and free press concerns, as evidenced by the introduction of television into the courtroom.

The spectre of juries swayed by the media, however, stalks the corridors of our courts.[2] Lawyer speech designed to put inadmissible evidence before a panel of jurors, and which poses an imminent danger of subverting the course of justice, is the proper concern of the bench and bar.

But lawyers who dwell in the courthouses are sometimes the most valuable public witnesses to what is going on there. James Otis argued the writs of assistance cases: Do we in retrospect wish he had been punished for speaking outside the court about the iniquity within? *See generally*, J. Quincy, Report of Cases Argued and Adjudged

[2] A presumption of prejudice from disseminated public remarks may well be overstated, as, for example, one Texas federal court has observed: "as a general rule, 'ordinary readers' in these parts are fortunately tolerant and skeptical." *Sweeney v. Caller-Times Pub. Co.*, 41 F. Supp. 163 (S.D. Tex. 1941).

in the Supreme Courts of Judicature of the Province of Massachusetts Bay 51-57, 469-82 (1865). As this Court has acknowledged, "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (Burger, C.J.)

This case should be heard because it will permit the Court to draw intelligible lines governing this clash of equally vital constitutional values. It presents a reputable lawyer, who studied the disciplinary rules before he spoke, App. at 11a, and whose client had already been sujected to public obloquy by police comments reported in the press. At the time of his comments he was aware that trial was scheduled to take place more than five months away, at a time when fading recollection and *voir dire* could mitigate any perceived harm. Moreover, the Nevada Supreme Court acknowledged that the criminal proceedings were not actually prejudiced by Mr. Gentile's comments, App. at 4a, thus apparently confirming Mr. Gentile's prior assessment that the fairness of the proceedings would not be placed in jeopardy by his comments. Further, the timing of the disciplinary charge itself lends the case an odor of selectivity.

No one doubts that lawyers have special obligations. They must behave themselves in court. They must not reveal client confidences. Many rulemakers and courts, however, have taken the lawyer's oath and his entry of appearance as acts that symbolically shed First Amendment protection to talk about matters of public concern. Nevada is such a jurisdiction. *See In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). In Nevada, a lawyer simply has no First Amendment right to speak about a pending trial if such speech runs afoul of the various general ethical standards. Here, the conduct said to conflict with the general standard is itself conduct that lies at the core of First Amendment protection under the speech and press

clauses: A public press conference about police misconduct, in which the speaker had a sound factual basis for his measured allegations.

II. WHILE FAIR TRIALS ARE AN IMPORTANT CONSTITUTIONAL CONCERN, THE FIRST AMENDMENT REQUIRES THAT OTHERWISE PROTECTED SPEECH OF COUNSEL CANNOT BE PRECLUDED OR CHILLED ABSENT THE EXISTENCE OF A CLEAR AND PRESENT DANGER TO THE FAIRNESS OF A TRIAL.

A. The Widely Differing Standards Employed for Regulating Lawyer Speech About Pending Litigation of Public Concern Raise Important First Amendment Issues.

State courts and licensing authorities take widely differing approaches and apply different standards to resolve conflicts between a lawyer's free speech rights and the need for a fair trial, leaving lawyers uncertain about their obligations.[3] *See generally*, Hoye, *Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys*, 38 Drake U.L. Rev. 31 (1988-89). *See, e.g., Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757, 763 (Tenn. 1989) (three standards applied in different jurisdictions: clear and present danger, serious and imminent threat, and reasonable likelihood of interference), *cert. denied*, 109 S. Ct. 3160 (1989). Federal courts are likewise split over the appropriate standard by which these competing interests are to be reconciled. *Compare Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc) (rejecting that First Amendment requires a clear and present danger standard, reasonable likelihood of

[3] The problem is heightened by the growth of the multi-city law firm, and by the increasing mobility of lawyers who may try cases in many jurisdictions, each with different rules. There may even be inconsistent state and federal court requirements in the same jurisdiction.

prejudice sufficient) *with Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (First Amendment requires "serious and imminent threat" exist to fair trial before regulation permissible, reasonable likelihood insufficient), *cert. denied*, 427 U.S. 912 (1976).

1. *Some Courts Hold That Disciplinary Rules Trump the First Amendment.*

Some courts, including the Nevada Supreme Court, regard the existence of a lawyer no-comment rule as dispositive, and reject the need for any careful First Amendment balancing or scrutiny. *See Committee on Professional Ethics & Conduct v. Hurd*, 360 N.W.2d 96 (Iowa 1984); *Re Lacey*, 283 N.W.2d 250 (S.D. 1979); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). Thus, these jurisdictions eschew any fact-specific reconciliation of the competing free speech and fair trial interests: Lawer speech that falls within an ethical proscription is simply not protected speech under the First Amendment.[4]

The Nevada Supreme Court's summary rejection of Mr. Gentile's First Amendment claim was adumbrated in *Raggio*, a case cited at length in the Bar's brief in that court. Raggio was a district attorney who held a press conference about a pending case. The Nevada Supreme Court held the First Amendment does not "give a lawyer the right to openly denigrate the court in the eyes of the public." 487 P.2d at 500. It also repeated a theme that one finds throughout cases taking this narrow view of free speech, that the lawyer sheds First Amendment protection by becoming a member of the bar, or entering an

[4] This analysis is incompatible with that employed in *Caplin & Drysdale v. United States*, 109 S. Ct. 2667, 2671 n.10 (1989) in which this Court held that a federal statute would trump "model disciplinary rules or state disciplinary codes." If a federal statute could so easily supersede state disciplinary rules, enforcement of a core constitutional guarantee such as the First Amendment should make short work of state disciplinary codes.

appearance as counsel in a case.[5] *Compare Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (in which the Court rejected such a rationale for limiting the Fifth Amendment protections of political party officials).

This Court, however, has rejected categorical rules that assume harm to the process in the free speech area. In the core category of speech on public affairs, this rejection is betokened by *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (legislative finding of clear and present danger no substitute for individual finding). Florida's categorical rule against witness disclosure of his own grand jury testimony was likewise held invalid in *Butterworth v. Smith*, *supra*. Even in the field of commercial speech, the Court has cautioned against substituting rules for reasons. *Shapero v. State Bar of Kentucky*, *supra* (categorical rule on solicitation). Especially where, as here, no actual harm occurred as a result of Mr. Gentile's comments, wooden adherence to categorical regulations of attorney speech imposes an unnecessary abridgement on speech. Indeed, Mr. Gentile must continue his practice ever vigilant that future violations could result in far harsher sanctions than a reprimand.

2. *Courts Employ Different Standards to Reconcile These Competing Constitutional Interests.*

State and federal courts have adopted different standards for determining when a lawyer's speech sufficiently jeopardizes a fair trial that it can be subject to regulation or discipline. In attempting to balance the competing interests of free speech and fair trial, courts have used a

[5] This conclusion is inconsistent with this Court's rejection in *Wood v. Georgia*, 370 U.S. 375 (1962) of a similar argument that a court sheriff automatically enjoyed diminished First Amendment rights because of his obligations to the court. *Id.* at 393-94. Rather, the proper inquiry should be whether the speech itself presents a clear and present danger to the fairness of a judicial proceeding.

variety of balancing tests.[6] The differing tests include: the "clear and present danger test,"[7] the "serious and imminent threat" to the fair administration of justice test,[8] the "substantial likelihood of material prejudice" test,[9] or the least stringent "reasonable likelihood" of prejudice test.[10] Significantly, these divergent standards are all ascribed to this Court, as lower courts have attempted to divine a standard faithful either to this Court's fair trial or free speech precedent. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979) (en banc) (tracing reasonable likelihood test to fair trial case of *Sheppard v. Maxwell*, 384 U.S. 333 (1966)); *id.* at 379 (Winter, J., concurring and dissenting) (clear and present danger test required under free speech precedent of *Bridges v. California*, 314 U.S. 252 (1959)).

Both the clear and present danger test and the serious and imminent threat test expressly incorporate a requirement of immediate harm, a requirement firmly rooted in this Court's First Amendment precedent. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

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[6] In *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981), the Kentucky Supreme Court upheld discipline of a lawyer who criticized a preliminary ruling by a trial judge in a litigation controversy involving abortion protests. The court justified its decision as "a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting an attorney's right to free expression." 602 S.W.2d at 167. *See also Nebraska State Bar Ass'n v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982).

[7] *See, e.g., Markfield v. New York*, 49 App.Div.2d 516, 370 N.Y.S. 2d 82, *app. dism'd*, 37 N.Y.2d 794 (1975).

[8] *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[9] ABA Model Rule of Professional Responsibility 3.6.

[10] *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757, 761 (Tenn. 1989).

845 (1978); *Bridges v. California*, 314 U.S. 252, 262 (1941). The other tests do not expressly require an immediate harm, but rather focus on the foreseeable likelihood of prejudice, a requirement traceable to this Court's fair trial precedent. *See Hirschkop v. Snead*, 594 F.2d at 369-70 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)). Given the vagaries of litigation, and the availability of alternate means such as *voir dire* by which to insure a fair trial, the elimination of a constitutional requirement for immediate harm is an important distinction. The practical impact of this distinction is especially apparent in a case like the present one, where counsel's comments came six months before the scheduled trial date, and extensive *voir dire* was conducted. Accordingly, it is singularly appropriate for this Court to provide guidance to lower courts as to the standard adequate to satisfy the competing constitutional interests in a fair trial and free speech.

In addition, this Court should consider whether alternative means exist which will protect fair trial interests while preserving counsel's free speech rights. Remedies such as extensive *voir dire*, change of venue, jury sequestration, or trial postponement have been identified by this Court as appropriate alternative remedies in a conflict between free speech and fair trial interests. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976), citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In the post-Watergate era, the ready use of these proven methods of diminishing the adverse impact of pretrial publicity should reduce the probability of prejudice in cases, like the present one, where counsel's speech occurs months before a jury is selected and in which, according to the Nevada Supreme Court, no actual prejudice occurred. *Compare Stroble v. California*, 343 U.S. 181 (1952) (affirming death penalty despite prosecution's release to media of defendant's confession because publicity receded six weeks before trial and a thorough *voir dire* conducted).

III. THE REGULATION IS BOTH VAGUE AND OVERBROAD.

The vices of vagueness in a first amendment setting are too familiar to require extended description. *See generally Procunier v. Martinez*, 416 U.S. 396, 413 (1974). In short, vague laws are infirm because their imprecision fails to give fair notice of proscribed conduct to those who would obey them and their ambiguity permits discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983). Both vices are present in the enforcement of this regulation of speech.

The Nevada Supreme Court Rule at issue is taken from ABA Model Rule 3.6, successor to the ABA Model Code Disciplinary Rule 7-107. *See generally* Comment, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107*: Hirschkop v. Snead, 41 Ohio St. L.J. 771 (1980). The Rule is cast as a prohibition of certain types of utterances, coupled with a list of comments that are presumptively within its sweep, and a further list of comments which the attorney may presumably safely make.[11] On its face, Mr. Gentile might reasonably have

[11] In pertinent part, the Model Rule reads:

"RULE 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have an effect when it refers to . . . a criminal matter . . . and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

. . .

[Continued]

thought his comments fell within the permitted commentary about "the general nature of the . . . defense," "the information contained in a public record," and "that an investigation . . . is in progress, including the general scope of the investigation, the . . . defense involved and . . . the identity of the persons involved." The Nevada Supreme Court disagreed, however, and found his remarks to be within the prohibited zone because they were comments on the credibility of a potential witness.

Under the Nevada Rule, Mr. Gentile had to hazard a guess as to the permissible scope of his speech. For example, the categorical prohibition on uttering opinions on the guilt or innocence of a defendant found in Model

[11] [Continued]

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;

. . .

(c) Notwithstanding paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved;

. . .

(7) in a criminal case:

. . .

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation."

Rule 3.6(b)(4) is contradicted by the Rule exception permitting discussion "without elaboration" on the "general nature of the claim or defense." Model Rule 3.6 (c)(1). As between these shoals, where does an assertion of innocence lie?

Similarly, the prohibition allegedly infringed here, the ban on statements relating to the credibility of an expected witness under Model Rule 3.6(b)(1), is contradicted by the exception permitting speech on the "general scope of an investigation, the offense or claim of defense involved and . . . the identity of the persons involved" under Model Rule 3.6(c)(3). Under pain of discipline, counsel must thread the needle between these competing ambiguous admonitions.

Moreover, even when counsel's comments, as here, cause no actual prejudice to the proceedings and thus satisfy legitimate fair trial concerns, his speech may be sanctionable if he steered too close to credibility statements about expected witnesses or if he provided the proscribed "elaboration" while setting forth the nature of the defense. In sum, the Rule fails to afford sufficient notice of proscribed conduct to survive a vagueness challenge. The lack of fair notice is borne out on the facts of this case, as Mr. Gentile acknowledged during the press conference that he had consulted with other counsel as to the limitations the Rule placed on his speech, and he cited ethics rules as the reason he declined to respond to credibility questions during the press conference. App. at 11a.

The Supreme Court of Montana has previously struck Disciplinary Rule 7-107 on vagueness grounds because it fails to create "a clear standard by which attorneys can gauge their conduct." *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211, 1214 (1984). The same infirmity afflicts Model Rule 3.6, as it also purports to set out safe harbors and forbidden paths for the advocate who wants to make public comment.

The Nevada and Model Rules use the "substantial likelihood" test, and impute a forbidden intent if the lawyer reasonably should know that the statement would be likely to have the forbidden effect. When clearly protected speech is brigaded with arguably unprotected speech or conduct, this Court has on occasion insisted that the actor must be proven to have intended to embrace unlawful conduct. *See Scales v. United States*, 367 U.S. 203, 229 (1961).[12] Such a test might properly form part of a test for lawyer speech about pending cases. It currently does not.

The possibility for discriminatory enforcement of such ambiguous admonitions is palpable. Here, Mr. Gentile reviewed the rules, App. at 2a, 11a, asserted that he was applying them in making disclosure determinations, App. at 11a, and caused no actual prejudice to the fairness of the recently scheduled but distant trial, App. at 4a. Nonetheless, his conduct was found punishable and he bears the stigma of being labeled as an unethical attorney ostensibly because he failed to reconcile the alternative ambiguous admonitions of the Rules. Certainly, the prospect of discriminatory enforcement will be present where, as here, an advocate's speech relates to corrupt law enforcement.

Moreover, even if the Rule facially applies to Mr. Gentile's speech, the Rule must be struck under the overbreadth doctrine because it plainly sweeps within it protected speech that fails to threaten fair trials. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

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[12] Some jurisdictions adhere to traditional First Amendment principles, and require a searching, fact-specific inquiry into the allegedly offending speech, the counsel's intent, and the speech's impact. *See, e.g., Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W. Va. 1988), *cert. denied*, 110 S. Ct. 406 (1989); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974).

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 20149

DOMINIC P. GENTILE,
Appellant,

vs.

THE STATE BAR OF NEVADA,
Respondent.

[Filed Feb. 21, 1990]

Appeal from a decision of the Southern Nevada Disciplinary Board of the State Bar of Nevada recommending that appellant be issued a private reprimand.

Affirmed.

Galatz, Earl, Catalano & Smith and Timothy C. Williams, Las Vegas, for Appellant.

Donald J. Campbell, Chairman, Southern Nevada Disciplinary Board, Las Vegas; Mary St. Clair, Executive Director, State Bar of Nevada, Las Vegas; John Howe, Bar Counsel, State Bar of Nevada, Las Vegas, for Respondent.

Kevin Kelly, Las Vegas, for Amicus Curiae National Association of Criminal Defense Lawyers.

OPINION

PER CURIAM:

The Southern Nevada Disciplinary Board of the State Bar of Nevada (the Board) recommended a private reprimand of attorney Dominic P. Gentile based on comments he made at a press conference regarding a pending criminal matter in which he represented the accused. In appealing the Board's decision, Gentile has expressly waived his right to confidentiality in these proceedings. Because we find that clear and convincing evidence supports the Board's recommendation, we affirm.

Appellant Dominic P. Gentile represented a client accused of taking money and drugs from a safety deposit box rented by undercover police officers. To respond to adverse publicity about his client, Gentile held a press conference the day after his client was indicted. He stated that he had evidence to prove that his client was innocent, and characterized his client as a scapegoat of the police. In addition, he criticized potential witnesses and their motives, and stated that they were convicted money launderers and drug dealers. He also named a certain police detective as the likely perpetrator and implied that the detective abused drugs. Gentile had researched the disciplinary rules regarding trial publicity prior to the conference.

A jury trial was held approximately six months later. Gentile's client was acquitted of all charges.

The State Bar of Nevada subsequently filed a complaint alleging that Gentile's remarks at the press conference violated Supreme Court Rule 177. Following a hearing, the Board found that Gentile had violated the rule and recommended that he be privately reprimanded. Gentile appeals the Board's decision.

Supreme Court Rule 177 states, in pertinent part:

> 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:
>
> (a) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness . . . .

SCR 177(1)-(2)(a).

To determine questions of fact, a higher degree of proof is required in disciplinary matters than in ordinary civil matters. In re Miller, 87 Nev. 65, 72, 482 P.2d 326, 330 (1971). The standard is whether the findings are supported by clear and convincing evidence. SCR 105(2)(e); Copren v. State Bar, 64 Nev. 364, 379, 183 P.2d 833, 840 (1947). However, the Board's recommendations, though persuasive, are not binding on this court. We must review the record de novo and exercise independent judgment to determine whether and what type of discipline is warranted. State Bar v. Claiborne, 104 Nev. 115, 126, 756 P.2d 464, 471 (1988); In re Kenick, 100 Nev. 273, 276, 680 P.2d 972, 974 (1984).

Based on our independent review of the record, we find that the discipline meted out by the Board was appropriate. Clear and convincing evidence supports the conclusion that appellant knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case. The "knows or reasonably should know" standard looks to what a person of reasonable prudence and intelligence ought to have known given the circumstances. A reasonable attorney, especially after having researched

the issue, should have known that his conduct was improper, particularly with respect to the comments regarding the police detective and other potential witnesses. In addition, the comments were "substantially likely" to prejudice the proceedings. The case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak. Furthermore, the comments were substantially likely to "materially prejudice" the proceedings. Although the evidence demonstrates that there was no actual prejudice in this case, absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.

Furthermore, clear and convincing evidence supports the Board's finding that appellant violated SCR 177(2)(a). Appellant stated that he had evidence that a police detective took the drugs and the money, and implied that the detective had a drug problem. He also stated that potential witnesses were convicted money launderers and drug dealers, and accused them of lying to get themselves out of trouble. The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceeding. We therefore conclude that appellant's comments fell within the scope of conduct prohibited by Supreme Court Rule 177(1)-(2)(a), and reject appellant's contention that they fell within the ambit of conduct permitted by Rule 177(3).

We also reject appellant's constitutional challenges as lacking merit under either the federal or Nevada constitutions.

Accordingly, we affirm the Board's decision.[1]

/s/ Steffen, A.C.J.
STEFFEN

/s/ Springer, J.
SPRINGER

/s/ Mowbray, J.
MOWBRAY

/s/ Rose, J.
ROSE

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[1] The Honorable Cliff Young, Chief Justice, has voluntarily disqualified himself from consideration of this case.

PRESS CONFERENCE

RE:

GRADY SANDERS

LAS VEGAS, NEVADA

[2]

APPEARANCES:

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[4] LAS VEGAS, NEVADA

MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases—at least two cases there—have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl.

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any [5] other living human being.

And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney's office.

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted

them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las [6] Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' crecks were missing.

Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box.

If you look at the indictment very closely, you're going to see that these claims fall under $100,000.

Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

That's about all that I have to say.

QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and—

MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? [7] I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

QUESTION FROM THE FLOOR: What is that? What is that proof?

MR. GENTILE: It'll come out; it'll come out.

QUESTION FORM THE FLOOR: Have you conducted your own investigation of Detective Scholl and his role in this?

MR. GENTILE: Well, yes. The answer to that is yes.

And I'm not—not only at liberty to discuss that now, George, but the fact is that I would be a pretty dumb lawyer if I gave it up now, wouldn't I?

QUESTION FORM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

MR. GENTILE: Well, I couldn't agree with them more.

QUESTION FORM THE FLOOR: Do you know anything about it?

[8] MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

All I can tell you is that you're in for a very interesting six months to a year as this case develops.

You're going to like covering this one.

QUESTION FORM THE FLOOR: Do you think that Grady Sanders was indicted because maybe authorities think he knows something; maybe he didn't do it, but he knows?

MR. GENTILE: I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the box.

Think about this for a second. The day that they opened a security box in a private vault company, they had a built-in scapegoat for ripping off anything they wanted out of their own box; anything, as do all of these so-called victims built-in. You couldn't ask for a better situation if you were going to try to run a scam like this.

You've got an automatic person to point the finger to, the proprietor, the man that ran the vault company.

You know, other law enforcement [9] agencies kept things on deposit at Western Vault Company, none of them have anything missing.

QUESTION FROM THE FLOOR: Such as?

MR. GENTILE: DEA, FBI, Customs.

But you know what the difference is? When they came in and they opened up their contact, they told Mr. Sanders, "We're the DEA. We're the FBI." Okay?

This undercover sting operation and any other type of undercover sting operation like this, it really endangers innocent people.

Forget about the people that they are trying to set up on these things.

I have my feelings about that and I'm sure that you do, too.

And some of those people are entrapped by these things, but when you are going to unwittingly use a person who is running a legitimate business and you are going to start storing major quantities of drugs and allegedly stolen property, at a minimum you ought to tell them that you're doing it.

A lot of things could have happened when these officers were flashing the drugs and flashing the money.

A lot of things could have happened.

[10] They, I think, unnecessarily endangered the lives of the employees of Western Vault Company by running the sting in that fashion.

QUESTION FORM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.

Can we go through it and elaborate on their background, interests—

MR. GENTILE: I can't because ethics prohibit me from doing so.

Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?

I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work.

QUESTION FROM THE FLOOR: What's Mr. Sanders been doing since he closed the vault?

MR. GENTILE: Well, Mr. Sanders is an entrepreneur. He has a number of businesses in town.

And, again, because of the stigma that attaches to merely being accused—okay?—I [11] know I represent an innocent man, Allen.

The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

I don't take cheap shots like this. I represent an innocent guy. All right?

And I don't want to have any more damage caused to Grady and his businesses merely by them coming to light as his other businesses.

QUESTION FORM THE FLOOR: Does he know anything about what happened to the police that opened the—

MR. GENTILE: No; nobody does except, I think, at least one metropolitan police department detective.

QUESTION FROM THE FLOOR: Did the cops pass the polygraph?

MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

QUESTION FROM THE FLOOR: Do you think the Slaughter case—that there's a connection?

MR. GENTILE: Absolutely. I don't think [12] there is any question about it, and—

QUESTION FROM THE FLOOR: What is that?

MR. GENTILE: Well, it's intertwined to a great deal, I think.

I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.

QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate—legitimately passed lie detector tests?

MR. GENTILE: I don't want to comment on that for two reasons:

Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

But, secondly, I don't have much faith in polygraph tests.

QUESTION FROM THE FLOOR: Did Grady ever take one?

MR. GENTILE: The police polygraph?

QUESTION FROM THE FLOOR: Yes.

MR. GENTILE: No, he didn't take a police polygraph.

QUESTION FROM THE FLOOR: Did he take one [13] with you?

MR. GENTILE: I'm not going to disclose that now.

QUESTION FROM THE FLOOR: You pretty much knew this day was coming, even though you think your client was innocent?

MR. GENTILE: Yes. I think this day was preordained before January 31, 1987.

I think that this day was in the minds of somebody that was involved in this thing the day they opened up the box.

They knew that they had a natural scapegoat. He was there. He was built-in. You couldn't ask for a better situation.

I'll tell you this: You're going to learn throughout these proceedings that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up.

QUESTION FROM THE FLOOR: How much and how long?

MR. GENTILE: I can tell you of at least two events and maybe as much as 10 grams at a time. That's no small amount.

QUESTION FROM THE FLOOR: You use that as [14] an illustration that maybe things in this investigation weren't being done the way they were supposed to.

MR. GENTILE: They were playing very fast and loose.

You know, a number of the so-called sting—in fact, Allen, again, if you think about it, this sting operation is the one, it's the same one that I talked to you about when I represented John Vaccaro. Okay? Same one, same cop, Steve Scholl.

We've got some video tapes that if you take a look at them, I'll tell you what, he either had a hell of a cold or he should have seen a better doctor.

QUESTION FROM THE FLOOR: Do you think that whoever took the cocaine used it or sold it?

MR. GENTILE: That's a lot of cocaine to use, isn't it?

I don't know the answer to that. If I speculate, I'd have to say sold it.

So that's four grams—kilos of cocaine they're claiming.

QUESTION FROM THE FLOOR: I was referring to what you just said about whether or not—how you think—how he might have used some of it.

MR. GENTILE: I didn't say he used it. I [15] said he had a hell of a cold.

QUESTION FROM THE FLOOR: Where is the video tape from?

MR. GENTILE: I have it here, if you guys want to see it.

It's a video tape that was taken by metro in their undercover apartment in another case, one that is not the Sanders case, another case. In fact, it's the Vaccaro case.

I also have audio tapes. Again, it's rather bizarre conduct.

I mean I'm no stranger to criminal cases and it's unusual conduct.

QUESTION FROM THE FLOOR: What do the video tapes and audio tapes show?

MR. GENTILE: I would much rather let you see them and hear them than let me comment on them, and then you can make up your own mind.

Obviously, I wasn't prepared to set them up today, but you guys can have them any time you want.

It's unusual for a lawyer to end up with multiple cases growing out of the same episode and it kind of gives you a little bit of an edge over when you usually have to face one case cold.

[16] I wonder what would happen if there was really a network of defense attorneys in this town that started sharing testimony and stuff like that from times that police say that A and B happened, and then another time in another case it was C and D, but it was the same thing.

QUESTION FROM THE FLOOR: Thanks.

MR. GENTILE: Thank you for coming.

(The proceedings concluded.)

[17] I hereby certify that I reported the within proceedings from videotape to the best of my abilities and transcribed same;

That the within is a true transcription of my shorthand notes so taken.

Dated this 31st day of May, 1983, at Las Vegas, Nevada.

/s/ Roger D. Calabrese
ROGER D. CALABRESE, CSR